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**Colloquium organized by the Council of State  
of the Netherlands and ACA-Europe**

***“An exploration of Technology and the Law”***

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**Answers to questionnaire: Germany**



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## **An exploration of Technology and the Law**

Technological advances are changing society more profoundly (and more rapidly) than ever before. This could have far-reaching implications for legislation and case law in the near future or even today.

A debate is now under way in various European countries about recent and future technological advances, including the development of self-driving cars, the increasing use of big data and the emergence of self-learning supercomputers, such as IBM's Watson. The fundamental question being asked is what social impacts these developments will have.

A debate is also going on among Europe's administrative courts and legislative advisory bodies about the relationship between these accelerating technological advances and the law, which is not evolving at the same pace. Precisely where and to what extent these developments intersect with the work of administrative courts and legislative advisory bodies is a theme we aim to address at the ACA Colloquium on 15 May 2018. This is unlikely to be the last time that the ACA will need to consider the relationship between technology and the law. Therefore another aim of the meeting will be to think about an agenda for the future and how we can keep up with developments as they unfold.

Given the breadth of the subject area and the limited time available at the Colloquium, the theme of technology and the law needs to be clearly delineated and specified. To this end, we would like to know which specific topics within this broad theme each country considers relevant.

Below you will find a number of exploratory questions relating to five potential themes that I have identified: digital decision-making, digital proceedings, digital dispute settlement, technology-neutral legislation and digital enforcement. These are followed by two open questions to encourage you to share your ideas on other relevant topics that we might discuss at our Colloquium on 15 May next year.

I would be grateful if you would send me your response by 15 September 2017 at the latest. After analysing the responses and selecting the definitive topics, we will send you a second, more comprehensive questionnaire in October.

Digital decision-making

*The use of ‘Big Data’ and algorithms enables decisions to be taken more rapidly and more frequently, for example on whether to issue permits, award grants or pay benefits. Critics warn of ‘government by robots’ that is hard to keep in check, while proponents argue that such technology will improve the justification and efficiency of decision-making.*

1. Do administrative bodies in your country make use of automated decision-making? By ‘automated decision-making’ we mean decisions based on automated files or computer models.

X Yes

Please provide an example.

Automated decision making is being used in tax law, which mostly falls under the jurisdiction of the financial courts. Section 35a of the Code of Administrative Procedure now also allows automated decision making in administrative procedures, if it is provided for by (a specific) law and if the relevant law does not grant any discretionary powers to the competent administrative authority. The norm is in force since 1 January 2017. It has been introduced to grant tax authorities and general public authorities corresponding forms of action. So far, there seems to be no application in general public law.

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Please also indicate what consequences automated decision-making has for you when assessing decisions in a judicial capacity and/or what particular aspects you have to consider when drafting advisory opinions on legislative proposals relating to this topic.

Automated decisions are – just like conservative decisions made by a human being – subject to preliminary proceedings within the executive. Thus, before such a decision reaches court, it will have been transformed in a human decision. So, no special consequences arise.

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o No

Is there a public debate in your country on this issue? Is the introduction of such a system under consideration? What advantages and disadvantages have been identified?

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

It would be interesting to hear, in what other fields of law member states have made experiences with automated decision making and special problems and – maybe – solutions to these problems have arisen.

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Digital proceedings

*An increasing number of countries now permit (or require) proceedings to be conducted digitally. The benefits of such a system are usually emphasised (e.g. efficiency gains), but how do digital proceedings relate in practice to principles such as access to the courts?*

2. Are digital (paperless) forms of legal proceedings used in your country? Is it possible in your country to conduct proceedings digitally, for example online? If so, is this optional or mandatory?

X Yes

Please describe your experiences, positive and/or negative.

Legal communication with the administrative courts may be conducted in digital form (section 55a Code of Administrative Court Procedure). For reasons of verification a qualified digital signature is to be applied. Digital communication with the court is presently a voluntary act, from 2022 on it will be obligatory for attorneys at law and for public authorities (Section 55d Code of Administrative Court Procedure).

Courts are also allowed to use electronic files (Section 55b Code of Administrative Court Procedure). As a matter of fact, court practice is presently using parallel structures, the paper file still being the leading file. In pilot projects some judges are presently testing exclusively electronic files.

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o No

Would you like to see the introduction of digital proceedings in your country? Is this under consideration? Is there a public debate on this issue? What advantages and disadvantages have been identified?

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

Possible topics for the Colloquium could be:

- The use of XML-standards for digital communication and file transfer
- The necessity of the use of digital signatures in digital communication and file keeping
- The use of meta data in digital files
- Data security
- Server responsibility in the judiciary (can the server be under the control of the executive?)
- Technical variability (is the judge obliged to work digitally if this is demanded by law or by the court administration?)

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Digital dispute settlement in the public sector without involving the courts

*If a party knows in advance that they have virtually no chance of winning a case, there is little point in instituting proceedings. Computer programs can analyse tens of thousands of judgments and use the results to predict the outcome and the chance of success or failure.*

3. In your country, are you aware of parties using computer systems within the public domain in the settlement of disputes prior to possible court proceedings? Examples may include systems that predict the outcomes of new cases on the basis of case law analysis, allowing parties to decide whether or not to pursue legal proceedings or settle out of court.

Yes

Please provide an example. Is it only parties to proceedings that make use of such systems, or do the courts also use them to assist them in reaching judgments? Is there any debate in your country on the use of such systems, for example in relation to fundamental rights and legal protection?

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No

Would you like to see such systems introduced? Is this under consideration? Is there a public debate in your country on this issue? What advantages and disadvantages have been identified?

I find it very hard, to imagine digital dispute settlement in the field of public law.

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

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Technology-neutral legislation

*If a statutory definition contains the words 'written' or 'in writing', does the definition also apply in a paperless context? If a self-driving car causes an accident, who is liable? The software manufacturer?*

4. Does your country have experience of legislation framed in a way that is technology-neutral or that otherwise takes account of future technological developments?

X Yes

Please provide an example in the context of your legislative advisory role and indicate whether or not the legislation in question succeeded in this regard, and why.

Section 3a of the Code of Administrative Procedure provides for an equal rank of a written signature and a digital signature in administrative proceedings. This may cause specific problems regarding the question of timely entrance. Where written documents have to physically reach the addressee a digital document will have to fulfil technical requirements which are totally different.

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o No

Does the lack of such legislation cause problems in your society or in other respects? Please provide an example.

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5. How do the courts (administrative or otherwise) in your country deal with legislation that is framed in terms of specific technologies? Do they apply strict interpretations in such cases or is it possible, or even customary, to apply a broader interpretation in order to resolve a problem? Is there any form of debate on this topic, for example with regard to fundamental rights?

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

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Digital enforcement

*More and more European countries are using digital data to enforce a range of legislation. In the Netherlands, digital data is used for a variety of purposes, such as vehicle speed checks on motorways and in lorries (by means of a tachograph), corporate and private tax returns filed online, and risk profiles developed by law enforcement authorities. In terms of fundamental rights and other such issues, what are the legal boundaries of digital enforcement?*

6. Do you know of cases in your country where automated data analyses are used for enforcement-related purposes, for instance to identify risk profiles? Perhaps the tax authorities use data analysis from various sources, for example, to perform targeted audits?

X Yes

Please provide an example. What specific angles of approach do you, as a legislative adviser and/or administrative judge, consider important in this regard?

Tax authorities use data analysis to check the conclusiveness of the application for a tax return. From the point of view of the courts, this kind of automated decision making should not lead to biasing the load of individual review to the courts. Thus, if the administrative procedure allows for preliminary proceedings within the executive branch, there should not be a problem with automated decisions. This way it is guaranteed – from a human rights perspective – that an individual control of the automated decision is conducted and that this function is not shifted to the courts.

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o No

Is the introduction of digital enforcement under consideration? Is there a public debate in your country on this issue? What advantages and disadvantages have been identified?

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Do you consider this topic suitable for a more detailed exchange of ideas at the Colloquium and, if so, what aspects of this topic warrant discussion?

It would be interesting to assess, how procedural rights of the citizens are reduced by digital decision making. The possibility to claim individual circumstances seems to be outruled in such an automated process. So, there must be an adequate compensation for this loss.

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Open-ended question for administrative jurisdictions

Are there technological developments (other than those already mentioned) that you believe will soon have far-reaching consequences for administrative courts (particularly developments you have already encountered or expect to encounter)?

Please list these developments in order of importance and explain why you consider them significant. Please also indicate whether you would like to discuss one or more of these topics in more detail in The Hague.

Open-ended question for legislative advisory bodies

Are there technological developments (other than those already mentioned) that you have already encountered or expect to encounter and believe will soon have far-reaching consequences for the legislative process and legislative advisory bodies in general?

Please list the developments in order of importance and explain why you consider them significant. Please also indicate whether you would like to discuss one or more of these topics in more detail in The Hague.